Supreme Court, U.S.
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No. 85-2085

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Beaudry Motor Company,

Petitioner,

v.

Abko Properties, Inc., Chrysler Corporation, Chrysler Motors Corporation, and Chrysler Realty Corporation,

Respondents.

Writ of Certiorari to the United States Court of Appeals, Ninth Circuit

Petition for Writ of Certiorari

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43pp

QUESTION PRESENTED FOR REVIEW

Whether a copy of an entry in the civil minutes of the United States District Court -- either signed by the clerk or not -- constitutes an "order" whose entry will commence the running of the time for appeal from judgments or orders of the United States District Court.

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Petitioner Beaudry Motor Company respectfully requests this Court to issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is recorded at 780 F.2d 751 (9th Cir. 1986), and is attached as Appendix A. The Order of the Ninth Circuit denying the Petition for Rehearing is unreported, and is attached as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit was entered January 9, 1986. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, and denied on March 18, 1986. This Court has jurisdiction by virtue of 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This action was begun in the Superior Court of the State of Arizona, in and for the County of Pima, and was removed to United States District Court by Respondent Abko Properties, Inc. While discovery

was underway in the District Court, Respondents filed a motion for summary judgment. N.R. 31.[1] Petitioner cross-moved for summary judgment, and on December 7, 1983, an order of the District Court was filed which granted Respondents' motion for summary judgment and denied Petitioner's cross-motion. N.R. 39 & 50. Judgment was entered by the Clerk of the United States District Court, utilizing a form printed for that purpose encaptioned "Judgment on Decision by the Court", on December 7, 1983, and a copy of that judgment was mailed to counsel. N.R. 51.

A timely motion for new trial was filed by Petitioner, and scheduled for hearing. N.R. 54. Before the hearing

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[1] The record references "N.R. ___" are references to the docket entries of the United States District Court, and use the same designations as are used by that court. The individual record items are contained in the Excerpt of Record filed with the Ninth Circuit.

occurred, and on January 5, 1984, a document entitled "Civil Minutes -- General" was typewritten and filed, stating that "For reasons set forth in Defendants' response to Plaintiff's motions for new trial and to amend complaint, it is ordered that Plaintiff's motions are denied." N.R. 62. An unsigned copy of the "Civil Minutes" was mailed to counsel, although the Clerk apparently signed the original minute entry which is on file with the court. N.R. 62; App. A at 13 .

Following the grant of their motion for summary judgment, Respondents moved for attorneys' fees. This motion was heard, granted in part, and Respondents were awarded $8,000.00 of the $73,594.00 requested before the District Court. N.R. 69.

Within thirty days following the entry of judgment on the award of attor-

neys' fees, Beaudry Motor Company filed its notice of appeal, indicating that the appeal was being prosecuted from the December 7, 1983, grant of Respondents' motion for summary judgment and the denial of Petitioner's cross-motion; the minute order of January 5, 1984, denying Petitioner's Motion for New Trial and Motion to Amend Complaint; and the order of March 21, 1984, awarding attorneys' fees to Respondents. N.R. 73.

Believing Beaudry's appeal to be untimely, Respondents moved before the Ninth Circuit for dismissal of the appeal, at least to the extent Beaudry's appeal related to the events of December 7, 1983, or January 5, 1984.

The motion to dismiss was referred to a motion panel of the Ninth Circuit, which initially granted the motion and dismissed the appeal, in part. Beaudry

petitioned for rehearing, and the initial dismissal of the appeal was set aside, and the question of timeliness referred to the merits panel.

On January 9, 1986, the merits panel decided the case, and in a decision authored by Judge Poole, held Beaudry's appeal from the decisions on the merits of the underlying action (as opposed to the attorneys' fees question) untimely. The merits of that part of the appeal were, of course, never discussed.

Following denial of Beaudry's petition for rehearing, the within petition was timely submitted.

REASONS FOR GRANTING THE WRIT

In 1952, the Ninth Circuit decided *Weldon v. United States,* 196 F.2d 874 (9th Cir. 1952), in which the court concluded that an unsigned "minute order" did not constitute an order which was appealable in

form. Later, following the 1963 amendment of the Federal Rules of Civil Procedure -- including an amendment to Rule 58 -- the Nintn Circuit decided *Calhoun v. United States,* 647 F.2d 6 (9th Cir. 1981). *Calhoun* holds that a document entitled "Minutes of the Court" showing that proceedings were held on a specific date and that the "motion was argued and order denied" on that date is <u>also</u> not an appealable order, <u>even though</u> signed by the clerk of the court. These two decisions plainly indicate that the Ninth Circuit's view, prior to the instant case, was that signed or unsigned "minute orders" or "civil minutes" were not appealable orders.

The Seventh Circuit of the United States Court of Appeals appears to follow the same rule, holding that a printed form "customarily used in the Northern District of Illinois to record motions presented,

appearances thereon, and dispositions thereof" and ordinarily referred to as a "minute order", is not an appealable order. *See Rappaport v. United States,* 557 F.2d 605 (7th Cir. 1977).

The United States District for the District of Arizona utilizes printed form documents, some of which are denominated "Judgment on Decision by the Court", N.R. 51, and others of which are dignified with a good deal less formality by being entitled "Civil Minutes -- General". See N.R. 62. The Ninth Circuit had not left much room for guesswork about the import of entries in the court's civil minutes, at least prior to the decision in the present case. Yet for its reliance upon the Ninth Circuit's prior decision in *Calhoun v. United States,* Petitioner was penalized in a rather draconian fashion by the loss of its right to appeal from the decisions on

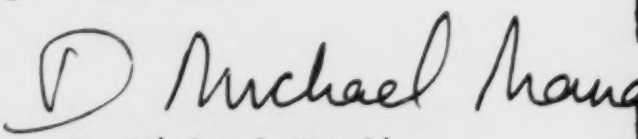
the merits underlying this action. Such would apparently not have been the result in the Seventh Circuit, *see Rappaport, supra,* and Petitioner urges this Court to issue its Writ of Certiorari to the Ninth Circuit either in the interest of regulating consistency of the decision-making of that court concerning the necessary elements of a final, appealable "order", or in order to resolve the disparate treatment of "minute orders" between the Ninth and Seventh Circuits.

CONCLUSION

Untimely filing of a notice of appeal is, of course, a fatal, jurisdictional problem. Trial and appellate courts should, therefore, be required to issue decisions and use various types of forms only where unmistakable clarity about the finality or appealability of "judgments", "civil minutes", "minute orders" and other

similar documents can readily be determined. In order to remedy an unfair loss of appellate rights, and to clarify the obvious gray areas of Federal Rule of Civil Procedure 58, this Petition should be granted.

Respectfully submitted,



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June 16, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEAUDRY MOTOR COMPANY, an Arizona corporation,	)	CA Nos. 84-1888 84-1889
Plaintiff/Appellant/ Cross-Appellee,	)	CV 82-262 TU ACM
vs.	)	**OPINION**
ABKO PROPERTIES, INC., a DE corporation (formally known as CHRYSLER REALTY CORPORATION); CHRYSLER CORPORATION, a DE corporation; CHRYSLER MOTORS CORPORATION, a DE corporation; and CHRYSLER REALTY CORPORATION, a DE corporation,	)	
Defendants/Appellees/ Cross-Appellants.	)	

Appeal from the United States District Court
for the District of Arizona
Honorable Alfredo C. Marquez,
District Judge, Presiding

Argued and Submitted: May 14, 1985
San Francisco, California

Before: POOLE, NELSON, Circuit Judges, and KELLEHER, District Judge*

POOLE, Circuit Judge:

Beaudry Motor Company (BMC) appeals the district court's order granting summary judgment for defendants, its order denying BMC's post-judgment motions for a new trial and for permission to amend the complaint, and its order granting defendants attorneys' fees. Defendants Abko Properties, Inc., Chrysler Corporation, and Chrysler Realty Corporation cross-appeal from the denial in part of their attorneys' fee request. We decline to address the merits of BMC's appeal of the district court summary judgment and post-judgment orders since we hold the appeal as to these

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* The Honorable Robert J. Kelleher, Senior District Judge for the Central District of California, sitting by designation.

issues untimely. We reverse and remand the issue of attorneys' fees for the district court to set forth its consideration of the factors announced in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied sub nom., 425 U.S. 951 (1976).

I.

Facts

BMC is a Chrysler franchise automobile dealer in Tucson, Arizona. With the goal to relocate BMC to a more competitive location in Tucson, Chrysler Realty Corporation (CRC) with BMC's approval purchased a tract of property for the dealership. Originally, CRC planned to retain title to the real estate, build a new dealership facility and lease it to BMC.

CRC, however, encountered difficulty obtaining suitable bids for construction of the facility, and so suggested that BMC

itself purchase the property and develop it. BMC was receptive to this idea, but soon discovered that local lenders refused to finance the full amount needed without the additional security of a "lease/sublease" agreement between BMC and CRC. Such an agreement was reached and BMC borrowed the necessary funds. Thereafter, CRC deeded the property to BMC, with BMC executing a twenty-five-year note and a deed of trust to the lending bank. CRC and BMC also entered into a leasing arrangement whereby BMC leased the property to CRC and CRC in turn subleased the premises to BMC. The lease and sublease were for twenty-five years with five options of five years each. Rent obligations for the lease and sublease were identical. BMC assigned its right to rent payments to the bank in order that CRC would become obligated to make rent

payments to the bank in the event that BMC became insolvent.

After several years BMC became dissatisfied with the lease arrangement as it wanted to use the realty for other, more profitable ventures. Negotiations with CRC to sell or lease a portion of the property were unsuccessful. Thereafter, in 1979, Chrysler Corporation sold CRC to Abko Realty, Inc. (Abko) and Abko assumed CRC's obligation under the lease agreement. In 1982, BMC began negotiating with Abko to terminate the lease/sublease agreement. These negotiations were also unsuccessful.

In 1982, BMC obtained from the bank's successor-in-interest a release of the lease assignment. BMC again sought to terminate the lease/sublease with Abko. After this offer was rejected, BMC filed an action in Arizona state court claiming that

the agreement was unconscionable or a violation of state antitrust laws.

Abko removed the action to federal court on diversity grounds. Subsequently, Abko sold its CRC interest back to Chrysler. BMC thereafter filed first and second amended complaints adding Chrysler Corporation and CRC as defendants and alleging federal antitrust claims and a state antitrust claim and asking for declaratory relief on the lease agreement on the ground of unconscionability.

Defendants moved for summary judgment on the theory that BCM's claims were time-barred and did not raise a justiciable controversy. They also moved for an award of attorney fees. In response, BMC filed a cross-motion for summary judgment in which BMC raised for the first time a new theory that the lease/sublease was a statutory mortgage or,

in the alternative, a security device under common law. BMC argued that since the bank had released the security, the district court should impose a constructive trust and compel reconveyance of the leasehold to BMC.

At argument on the motions, BMC's counsel admitted that he was abandoning the antitrust claims. Concluding that the amended complaint failed to allege a constructive trust theory, the district court granted defendants' motion for summary judgment. Judgment was entered on December 7, 1983.

BMC thereafter filed a timely motion for a new trial and sought permission from the court to amend its complaint to allege the new theories. On January 5, 1984, the district court entered a minute order denying BMC's motions "[f]or [the] reasons set forth in defendant's [sic] response to

plaintiff's motions for new trial and to amend complaint." Copies of the minute order were mailed to counsel, and plaintiff's counsel received his copy on January 9, 1984.

Defendants' motion for attorneys' fees was argued January 23, 1984. On March 21, the district court entered an order finding that defendants were entitled to an award of $8,000. On April 20, BMC filed its notice of appeal. Defendants timely cross-appealed from the denial in part of their fee request.

II.

Timeliness of BMC's Appeal on the Merits

Before this court, defendants moved to dismiss BMC's appeal of the merits on the ground that BMC's notice of appeal was filed more than thirty days after the district court's denial of BMC's post-

judgment motions. A panel of this court denied the motion leaving to us the consideration whether the January 5 order should be deemed a judgment or order within the meaning of Fed. R. Civ. P. 58.

Fed. R. App. P. 4(a) requires that a notice of appeal in a civil case be filed within thirty days after the date of entry of the judgment or order appealed from. A timely motion for a new trial under Fed. R. Civ. P. 59, however, stays the time for appeal. Fed. R. App. P. 4(a)(4). A new notice of appeal must then be filed within thirty days, measured from the entry of the order disposing of the post-judgment motion. Id. These time periods for appeal are jurisdictional and cannot be waived by the parties. Browder v. Director, Illinois Department of Corrections, 434 U.S. 257, 264 (1978).

It is the date of "entry" of a judgment or order that starts the time period for noticing an appeal. A judgment or order is not entered within the meaning of Fed. R. App. P. 4(a) unless it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure. Calhoun v. United States, 647 F.2d 6, 8 (9th Cir. 1981); Fed. R. App. P. 4(a)(6). Rule 58 requires that every judgment be set forth on a separate document,[1] and Rule 79(a) details the civil docketing procedure to be followed by the district court clerk when entering the judgment.[2]

BMC makes several arguments that its notice of appeal filed 110 days after the January 5 order is timely. First, BMC contends that the minute order denying its post-trial motions is not a judgment or order within the meaning of Fed. R. Civ. P.

58. Second, it argues that the minute order did not meet the entry requirements of Fed. R. Civ. P. 79(a). Last, BMC argues that the judgment on the merits was not final absent compliance with Fed. R. Civ. P. 54(b) while the motion for attorneys' fees was pending. The earlier panel rejected the latter arguments and left to us the resolution of the first. Nevertheless, the motion panel's entire order is subject to reconsideration. See In re Commercial Western Finance Corp., 761 F.2d 1329, 1332 n.6 (9th Cir. 1985); United States v. Humphries, 636 F.2d 1172, 1174 n.2 (9th Cir. 1980), cert. denied, 451 U.S. 988 (1981).

Rule 58 provides that when relief is denied by the court, the clerk, unless otherwise directed by the court, "shall forthwith, prepare, sign, and enter the judgment * * * *" Fed. R. Civ. P. 58. BMC

contends that the January 5 minute order fails to comply with the rule because it was not signed and does not purport to be an order disposing of the pending motions. BMC relies on Weldon v. United States, 196 F.2d 874 (9th Cir. 1952) and Calhoun v. United States, 647 F.2d 6 (9th Cir. 1981) for support.

In Weldon, what was filed with the clerk of the district court was an unsigned, typewritten paper labeled "Minute Order," which denied plaintiffs' petitions. This court held that the minute order could not be regarded as an order of the district court because the record failed to show that the district court wrote or filed the minute order or caused it to be written or filed. Weldon, 196 F.2d at 876. In addition, this minute order was never noted in the civil docket sheet, and thus, never became effective or appealable. Id. Here

BMC concedes that the minute order was prepared at the direction of the district judge. The order also was noted in the civil docket. Finally, the court's copy of the order is file stamped and signed by a deputy clerk. Apparently the copy mailed to counsel was file stamped but unsigned. This fact, however, does not alter our conclusion. The copy of the minute order with its language "IT IS ORDERED" clearly put plaintiff's counsel on notice that an order had been entered against his client. Faced with this language and the presence of a file stamp on the document, counsel should have checked the court's record if he had any doubt about whether the order was signed rather than allow the period for appeal to expire and risk the possibility that a signed order in fact had been entered.[3]

BMC's reliance on Calhoun is also misplaced. The document at issue in Calhoun simply showed that proceedings were held and that the "[m]otion [was] argued and ordered denied." 647 F.2d at 8. The document, although signed and docketed by the clerk, contained no filing or other stamp of the district court. Moreover, the clerk did not mail copies to the parties. This court concluded that the document failed to comply with Rule 58 because it did not constitute a separate "order" but instead appeared to be a notation of the court's proceedings. Id. at 9.

These circumstances are absent here. The January 5 order, although labeled "Civil Minutes-General", does not reference proceedings but is clearly by its language a decision of the court. Both the order and the docket sheet indicate that the clerk treated the document as an order and

mailed copies to counsel. Thus, we find that the January 5 order sufficiently complied with Rule 58.

Fed. R. App. P. 4 also requires that an appealable order be entered in compliance with Rule 79(a). Rule 79(a) mandates, inter alia, that all orders be entered chronologically in the civil docket with each entry briefly showing both the date the order was entered and the substance of the order. Fed. R. Civ. P. 79(a).

The district court docket referencing the January 5 minute order reflects the following notation:

Date	N.R.	Proceedings
01/05	62	M/E (ACM): For reasons set forth in Dft resp to Pltf Mots for New Trial and to Amd Cmplt, ORD that Pltf Mots are DENIED. (cc: Mandig, White, ACM)

We agree with the motion panel that the docket sheet entry complies with the requirements of Fed. R. Civ. P. 79(a). The entry briefly states the substance of the minute order as being an order denying BMC's post-judgment motions, and it sufficiently demonstrates the date upon which entry was made. Cf. Calhoun, 647 F.2d at 9.

Moreover, we also reject BMC's contention that the final judgment on the merits was not final absent compliance with Fed. R. Civ. P. 54(b) while defendants' motion for attorneys' fees was pending. Rule 54(b) has no application to motions for attorneys' fees. International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers' Local 75 v. Madison Industries, Inc., 733 F.2d 656, 658 (9th Cir. 1984) (a judgment on the merits is final and appealable even

though a request for attorneys' fees is pending); Swanson v. American Consumer Industries, Inc., 517 F.2d 555, 571 (7th Cir. 1975) (Rule 54(b) inapplicable to outstanding claim for attorneys' fees). We conclude that the district court's January 5 minute order constituted a final appealable order under 28 U.S.C. §1291 (1982). Because BMC failed to file its notice of appeal within the thirty-day period prescribed by Fed. R. App. P. 4(a), its appeal of the merits is untimely, foreclosing appellate review of those issues. See Scott v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1984).[4]

III.

Attorneys' Fees

Defendants requested attorneys' fees of $73,594 for prevailing on their summary judgment motion. The district court awarded defendants $8,000. BMC timely

appeals from the award and argues that no fees are authorized under either federal or state law. Defendants cross-appeal from the reduction of their request. We find the district court's order inadequate for review, and we reverse and remand to the district court to make further findings.

An award of fees to the prevailing party is proper if (1) authorized by statute or, (2) the court finds that the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. International Union of Petroleum and Industrial Workers v. Western Industrial Maintenance, Inc., 707 F.2d 425, 428 (9th Cir. 1983). The district court held that defendants were entitled to attorney fees under either theory. Because we find that fees properly were imposed under the court's inherent equitable power,

we need not decide whether fees were statutorily authorized.

We review a district court's finding that the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons under the clearly erroneous standard. Id.; Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1298 (9th Cir.), cert. denied, 459 U.S. 990 (1982). If "bad faith" is found, an award of attorney fees is within the district court's discretion, International Union of Petroleum and Industrial Workers, 707 F.2d at 428, and we will not disturb the award unless the district court has abused its discretion. Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1384 (9th Cir. 1984).

An award of attorney fees under the "bad faith" exception "is punitive, and the penalty can be imposed 'only in exceptional cases and for dominating reasons of

justice.'" United States v. Standard Oil Co., 603 F.2d 100, 103 (9th Cir. 1979) (quoting 6 J. Moore, Moore's Federal Practice Para. 54.77[2] (2d ed. 1972)); see Hall v. Cole, 412 U.S. 1, 5 (1973).

Here, the district court found that BMC should have been aware that their claims were barred by the statute of limitations because the complaint was filed approximately thirteen years after the lease/sublease was executed and 15 U.S.C. §15b (1982) provides a four-year statute of limitations for private antitrust actions. BMC's contractual and state antitrust claims were barred by Arizona's statutes of limitation. Ariz. Rev. Stat. Ann. §12-548 (1982) (six years for contract claims); id. §44-1410 (Supp. 1984) (four years for antitrust claims). Thus, BMC's claims were not colorable. See Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980) ("A claim

is colorable * * * when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim."). Moreover, the court noted that once defendants moved for summary judgment, BMC abandoned its antitrust claims and attempted to change its theory on the declaratory relief count. These facts are sufficient to suggest that BMC's institution of this action thirteen years after it entered into the lease agreement with CRC was for an improper purpose, and thus it was not clearly erroneous for the district court to conclude that BMC's claims were brought and maintained unreasonably and in bad faith. See Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1332 (9th Cir. 1981). As a result, the district court's decision to award attorneys' fees did not constitute an abuse of discretion. International Union

of Petroleum and Industrial Workers, 707 F.2d at 428; cf. Standard Oil Co., 603 F.2d at 103-04 (suggests that a showing of bad faith is not even necessary if the relationship of the parties prior to litigation involved some kind of contract or other legal relationship out of which the litigation arose).

Although the district court acted within its discretion in awarding defendants attorneys' fees, we cannot affirm the district court's order in its entirety. Defendants requested $73,594 in attorneys' fees. The district court concluded that this amount was excessive and awarded $8,000 as fair compensation for the time that reasonably should have been spent in getting the case dismissed. In arriving at this amount, the court stated that it "has considered the factors set forth by the Ninth Circuit in Kerr v.

Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975)." The court then listed these factors identifying the most important ones it considered. We cannot affirm the district court's order because "[t]he gap between the figures employed by [the party requesting fees] * * * and the amount ordered by the district court is too great to permit a mere recital of having considered Kerr to insulate the order from reversal." Harmon v. San Diego County, 664 F.2d 770, 772 (9th Cir. 1982) (as amended); see Domingo v. New England Fish Co., 727 F.2d 1429, 1447 (9th Cir.), modified, 742 F.2d 520 (9th Cir. 1984). Consequently, we reverse and remand the award to the district court to provide a more detailed explanation of how it arrived at the final amount of the award in terms of the guidance Kerr provides. We express no

opinion as to the proper amount of the ultimate fee award.

Defendants also seek reimbursement for attorneys' fees incurred in this appeal. We decline to make such an award as we find BMC's arguments on appeal not wholly devoid of merit. See Masalosalo v. Stonewall Insurance Co., 718 F.2d 955, 958 (9th Cir. 1983) (jurisdictional issue concerning effect of filing notice of appeal not frivolous); International Union of Petroleum and Industrial Workers, 707 F.2d at 430 (challenge to fee award not frivolous).

IV.

Conclusion

BMC's appeal on the merits is dismissed for lack of jurisdiction. The district court's order awarding defendants attorneys' fees of $8,000 is reversed and remanded for further findings consistent

with this opinion. Defendants' request for an award of attorneys' fees incurred in this appeal is denied. Each party shall bear its own costs on appeal.

DISMISSED IN PART; REVERSED AND REMANDED IN PART.

1. Rule 58 of the Federal Rules of Civil Procedure provides in part:

> [U]pon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court * * * * Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).

2. Rule 79(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> The clerk * * * shall enter [in the civil docket] each civil action to which these rules are made applicable. Actions shall be assigned

> consecutive file numbers. * * * All papers filed with the clerk, * * * all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court * * * * The entry of an order or judgment shall show the date the entry is made.

3. This holding comports with the purpose of the separate document requirement. That purpose is to avoid the inequity of a party being denied the opportunity to appeal because of a failure to recognize which of several documents or docket entries constituted "entry" of judgment. Bankers Trust Co. v. Mallis, 435 U.S. 381, 385 (1978) (per curiam); Taylor Rental Corp. v. Oakley, 764 F.2d 720, 722 (9th Cir. 1985). In this case, plaintiff's counsel received a document, the sole contents of which informed him that his post-judgment motions had been ordered denied and which was file stamped. We have no trouble concluding that in these circumstances a reasonable person would realize that the court had entered an order finally disposing of the case.

4. Although the time for filing a notice of appeal may be extended upon a showing of excusable neglect, such an

extension is foreclosed in this case. The district court may extend the time for filing a notice of appeal only upon motion filed not later than 30 days after the expiration of the time prescribed by Rule 4(a). Fed. R. App. P. 4(a)(5). Here no such motion was made.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 18 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BEAUDRY MOTOR COMPANY, an Arizona corporation, Plaintiff/Appellant/Cross-Appellee, vs. AMKO PROPERTIES, INC., a DE corporation (formally known as CHRYSLER REALTY CORPORATION); CHRYSLER CORPORATION, a DE corporation; CHRYSLER MOTOR CORPORATION, a DE corporation; CHRYSLER REALTY CORPORATION, a DE corporation, Defendants/Appellees/Cross-Appellants.	CA Nos. 84-1888 84-1889 CV 82-262 TU ACM ORDER

Before: POOLE, NELSON, Circuit Judges, and KELLEHER, District Judge*

The panel has unanimously voted to deny both the petition for rehearing and the amended petition for rehearing. Judges Poole and Nelson have also voted to reject the suggestion for rehearing en banc, and Judge Kelleher has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter.

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Pet. for Writ of Cert. - pg. 11
3/p.c.

* The Honorable Robert J. Kelleher, Senior District Judge for the Central District of California, sitting by designation.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petitions for rehearing are DENIED and the suggestion for rehearing en banc is REJECTED.

No. 85-2085

(2)

Supreme Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1986

BEAUDRY MOTOR COMPANY,
an Arizona corporation,

Petitioner,

vs.

ABKO PROPERTIES, INC., CHRYSLER CORPORATION, CHRYSLER MOTOR CORPORATION, and CHRYSLER REALTY CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner could purposefully wait 110 days from the entry of a separate order denying its post-judgment motion to appeal simply because the order was entitled "Civil Minutes" and even though such order met all requirements to begin the time for appeal to run.
2. Whether a court is required to enter two orders from which to appeal even though the first order meets all requirements of an appealable order and is treated as such by all parties.

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BEST AVAILABLE COPY

No. 85-2085

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1986

BEAUDRY MOTOR COMPANY,
an Arizona corporation,

Petitioner,

vs.

ABKO PROPERTIES, INC., CHRYSLER CORPORATION, CHRYSLER MOTOR CORPORATION, and CHRYSLER REALTY CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In its statement of the proceedings below, petitioner has failed to refer to various facts and events which may have a bearing on

the Court's understanding of the case and the issues presented. Respondents therefore will briefly review those pertinent events.

This case began in 1982 when petitioner, relying upon a contract entered into almost a decade earlier, filed its complaint. Almost two years later, after petitioner had repeatedly amended its complaint and in the last few days permitted for discovery, respondents filed their motion for summary judgment. Petitioner responded with a cross-motion for summary judgment, relying on a claim petitioner admitted and the district court found at oral argument never to have been alleged. C.R. 68 at 23-25. On December 7, 1983, the district court entered an order and a separate judgment granting respondents' motion and denying petitioner's motion. C.R. 50 and 51. There is no dispute that this order and judgment were properly prepared, filed, and entered.

Following entry of judgment, petitioner moved for a new trial and to again amend its complaint to assert its newly conceived theory. C.R. 54 and 55.

On January 5, 1984, the district court entered an order entitled "Civil Minutes" denying petitioner's motions ("January 5 Order"). C.R. 62. That order, like the December 7 order and judgment, was a separate document dated, prepared, and signed by the court, entered on the docket (and so dated), and mailed to and received by all parties. C.R. 62. (Retyped copies of the order and relevant docket pages are attached as part of the Appendix for the Court's convenience.) Furthermore, petitioner treated the January 5 Order as exactly such an order in its reply memorandum on the motion for new trial. C.R. 64. In that pleading, petitioner referred to the January 5 Order as the document "in which this Court denied Plaintiff's Motion for New

Trial...." C.R. 64 at 1-2.

As Petitioner has admitted, while a motion for attorneys fees was pending, it purposefully waited 110 days from the entry of the January 5 order to file its notice of appeal. C.R. 73 and Petitioner's Reply/Answering Brief [Regarding Jurisdictional Issues] (before the Ninth Circuit) at 15, n. 3. Again, in that Notice of Appeal, petitioner referred to the January 5 Order as the "Order entered January 5, 1984 denying Plaintiff's Motion for New Trial...." C.R. 73 (emphasis added).

Finally, petitioner repeatedly raised before the Ninth Circuit issues concerning its 110-day delay in filing a notice of appeal. Interestingly, petitioner's primary arguments below dealt not with the form of the January 5 Order, but with the issue of whether the order had to be signed. The Court of Appeals initially dismissed petitioner's appeal from

the December 1983 and January 5 orders and judgment as untimely. It then reinstated that appeal for consideration of whether the January 5 Order had to be signed. The merits panel reheard and rejected all of the arguments of petitioner on his delay in filing his appeal. Beaudry Motor Co. v. ABKO Properties, 780 F.2d 751 at 753-755 (9th Cir. 1986).[1/]

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for several distinct reasons:

1. The January 5 Order met all of the requirements of an appealable order. Petitioner's only complaint is that the time to appeal can not begin to run unless the order is entitled "Order." On these facts, no

---

[1/] The Court of Appeals expressly found that the January 5 Order had been signed, a fact which petitioner does not now dispute. 780 F.2d at 754 and Petition for Writ of Certiorari at 4.

important issue of law is presented. There is no basis for such a requirement, especially where petitioner knew and treated the January 5 Order as the order denying the post-judgment motion.

2. The decision below does not conflict with prior decisions of the Ninth Circuit, decisions of other circuit courts of appeal or any decision of this Court.

3. Petitioner's position would lead to confusion and an absurd interpretation of the federal rules.

REASONS FOR DENYING THE WRIT

A. There is no requirement for all district courts to use the identical form for post-judgment orders, especially where the order was recognized and treated as a final order.

Petitioner has cited no rule, case, or policy to require all district courts to use the identical form entitled "Order" for post-judgment orders. Such a requirement

simply does not present an important issue of law. Especially here, no such requirement is necessary where all parties recognized and treated the order as being a final order starting the time in which to appeal.

28 U.S.C. § 2107 and Rule 4(a)(4), Fed. R. App. P. require any notice of appeal to be filed within 30 days after the entry of a judgment or an appealable order. This requirement is considered jurisdictional. Browder v. Director, Illinois Department of Corrections, 434 U.S. 257 (1978).

This Court and Rule 4(a)(6), Fed. R. App. P. require that the entry of any judgment or final order meet certain objective requirements to give a party clear notice as to when the time to appeal begins to run. United States v. Indrelunas, 411 U.S. 216 (1973) and 6A Moore's Federal Practice, 2nd ed., ¶¶ 58.02 and 58.02.1 at 58-19 and 58-20. These objective requirements include that any

judgment be filed on a separate piece of pape and be entered in the docket.[4/]

In this case, petitioner does not dispute that the January 5 Order meets all of these requirements to be effective. Thus, it was a separate document (see Appendix), was signed by the Clerk (Petition for Writ at 4), and wa duly entered on the Civil Docket (see Appendix). Moreover, while not required, the order was mailed to all parties (Rule 77(d), F. Rules Civ. P.), such mailing was noted in the district court's docket sheet and the order was received by petitioner.

Petitioner's only complaint is that the January 5 Order was entitled "Civil Minutes" and not "Order". Petitioner points to no requirement provided by statute, case law, or reason for all orders to be of the same form.

[4/] Rule 4(a)(6), Fed. R. App. P. requires an order to be entered in the docket in conformance with Rules 58 and 79(a).

Rather, the rules require objective criteria to be met to place prospective appellants on clear notice. They do not and cannot provide criteria to meet every individual's subjective needs.

Obviously, the procedures of Rules 58 and 79 should be applied mechanically, but not mindlessly. Weinberger v. United States, 559 F.2d 401 at 402 (5th Cir. 1977). Here, all of those requirements have been met and all of the parties treated a document as a final order. Based upon such facts, it should be so treated by the courts. Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1977); Weinberger v. United States, supra; and Kramer v. American Postal Workers Union, AFL-CIO, 556 F.2d 979 (9th Cir. 1977).

Indeed, as the facts of this case show, petitioner's proposed rigid requirement would have served no purpose. Here, the mechanical application of Rules 58 and 79(a) led

petitioner to recognize and treat the January Order as the final decision denying its post-judgment motions. C.R. 64. Even if this recognition was not present, petitioner's delay in filing its notice of appeal was solely due to its own lack of diligence in not determining the effect of the entry of "Civil Minutes." Kramer v. American Postal Workers Union, AFL-CIO, supra and Beaudry Motor Co., supra, 780 F.2d at 755, n.3.

B. Petitioner has not shown a conflict with decisions of this Court or other courts and has not presented an important issue of federal law.

As noted above, petitioner's argument is that regardless of meeting the requirements of Rules 58 and 79, a post-judgment order is not effective: (1) unless it is entitled "Order" and (2) even if all parties treat it as a final order. Petitioner has failed to show any conflict between the decision below and any decision of this Court.

Petitioner's sole argument is that the decision below conflicts with prior Ninth Circuit decisions and a decision in the Seventh Circuit. Petitioner's reliance on those cases is misplaced as the facts in those cases greatly differ from the facts here.

First, in Weldon v. United States, 196 F.2d 874 (9th Cir. 1952), the issue was not whether the form of an order was adequate. As the Court of Appeals noted below, the only issue in Weldon was whether an unsigned and unentered document was authentic, e.g., whether it was prepared at the direction of the district court. 780 F.2d at 754. In contrast, the January 5 Order was on a form prepared by the district court, was signed, was entered, and was treated by petitioner as authentic. C.R. 62, 64 and 73.

Petitioner also argues that the January 5 order was similar to the "notation of proceedings" in Calhoun v. United States, 647

F.2d 6 (9th Cir. 1981). Petitioner's reliance on Calhoun is misplaced. As noted by the Court of Appeals below, 780 F.2d at 755-756, a comparison of the facts in Calhoun and the facts here shows that:

(1) In Calhoun, the "Minutes of the Court" reflected that proceedings were held and the motion was denied. 647 F.2d at 8. In contrast, here a separate order was clearly prepared by the court, dated January 5, and expressly says "IT IS ORDERED that plaintiff's motions are denied." Emphasis added.

(2) In Calhoun, the clerk did not file an order. Rather, he simply marked the docket, on some undefined date, to reflect that proceedings were held and the content of the court's minutes. 647 F.2d at 8. Here, the clerk stamped the separate order as filed and noted the order on the docket sheets on January 5.

(3) In Calhoun, there is no indication that the clerk treated the minutes as an order by mailing copies to counsel in accordance with Rule 77(d). 647 F.2d at 8. In this case, the clerk treated the order as an order, mailed it to counsel, and showed the mailings in the docket. C.R. 62. Plaintiff admits having received the order on January 9, 1984, four days after entry, and referred to it as the decision denying its motion for new trial. C.R. 64.

(4) In its April 20 Notice of Appeal, plaintiff expressly says that it is appealing from the "Order entered January 5, 1984 denying Plaintiff's Motion for New Trial and Motion to Amend Complaint...." Emphasis added.

Finally, there is no conflict between the decision below and Rappaport v. United States, 557 F.2d 605 (7th Cir. 1977). In Rappaport,

the district court entered a minute order granting summary judgment. It failed, however, to prepare a separate judgment and have it entered. Thus, the Seventh Circuit found that Indrelunas, supra and Rule 58 had not been met because the order was never transformed into a final judgment. The "minute order", however, was still an effective order.

In contrast, here the district court entered an order and a separate judgment on December 7. C.R. 50 and 51. Approximately one month later, the January 5 order was entered dismissing petitioner's post-judgment order. Neither Rappaport, supra nor any other case or authority requires a second, separate document entitled "Order" to be filed. In contrast, see United States v. Clearfield State Bank, 497 F.2d 356 (10th Cir. 1974) (two documents not required where filed document was intended to be an order).

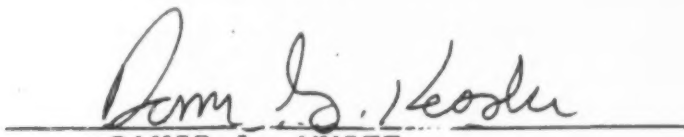
C. Petitioner's argument would lead to confusion and an absurd interpretation of the federal rules.

Finally, petitioner argues that regardless of meeting the requirements of Rules 58 and 79(a) and regardless of petitioner's treating the January 5 Order as final, the time to appeal never even began to run until a second document entitled "Order" is entered. Not only does this argument render absurd the entire proceedings in this case, but it would lead to confusion in the district courts. Each untimely filing of an appeal would lead the tardy appellant to argue that some form of the order was inadequate whether that form be its title or its exact language. Such an excuse for lack of diligence should not be permitted where the mechanics of Rules 58 and 79 have been followed to give clear notice to potential appellants of the need to file a notice of appeal.

CONCLUSION

For the reasons set forth by the Ninth Circuit below and in this pleading, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,



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July 16, 1986

28 U.S.C. § 2107

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree....

RULE 58, FED. R. CIV. P.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

RULE 4(a), FED. R. APP. P.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

....

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL MINUTES - GENERAL)

Civil Case No. CIV-82-262-TUC-ACM
Date January 5, 1984

Title: BEAUDRY MOTOR CO. vs.
ABKO PROPERTIES, INC.

==========

Present HON. ALFREDO C. MARQUEZ JUDGE

Deputy Clerk Court Reporter

ATTYS FOR PLAINTIFF(s) ATTYS FOR DEFENDANT(s)

==========

Proceedings: __Open Court __Chambers X Other

For reasons set forth in defendant's response to plaintiff's motions for new trial and to amend complaint,

IT IS ORDERED that plaintiff's motions are denied.

FILED
January 5 12:44 PM
W.J. Furstenau
U.S. District....
By Deputy Clerk

Copies issued to:
MANDIG, WHITE, ACM

CIVIL DOCKET CONTINUATION SHEET

Plaintiff BEAUDRY MOTOR COMPANY
Defendant ABKO PROPERTIES, INC et al
Docket No. 82-262 Page [4-5]

Date	NR.	Proceedings
1983		
09/13	38	Stip & ORD that Pltf shall have til 09/23/83 to file memo & stmt of fact in oppos to Dft's Mot for Sum Jdmt; Dfts have tl 10/12/83 to file reply memo & any stmt of facts in spprt of Mot for Sum Jdmt; Pltf shall file any Cross Mot by 9/23/83; Hrg set for 11/21/83 @ 9 am (see order) (ACM) (cc: Mandig, White, ACM)
09/27	39	Pltf's Cross-Mot for Sum Jdmt w/Memo P/A
09/27	40	Pltf's Statement of Facts Purs to Local Rule 11(i).
09/27	41	Pltf's Resp in Opposition to Dft's Mot for Sum Jdmt.
09/27	42	Pltf's Aff in Supp of Resp in Opp to Mot for Sum Jdmt.
10/12	43	Dfts Reply to Resp to Mot for Sum Jdmt
10/26	44	Dfts Resp to Cross-mot for Sum jdmt
10/26	45	Dfts Stmt under LR11 in Oppos to Pltfs Cross-Mot for Sum Jdmt

11/14	46	Pltf Reply in Spprt of Cross-Mot for Sum Jdmt
11/15	47	Dft Ntc of Fil Aff of William J. Craib
11/15	48	Dft Aff of William J. Craib, employee of Chrysler Realty Corp
11/21	49	M/E (ACM): Hrg on Dfts Mot for Sum jdmt & Pltfs Cross-Mot. ORD THAT Dfts Mot for sum jdmt is GRANTED. Pltfs Cross-Mot is DENIED. Formal ord to follow. (cc: ACM)
12/07	50	ORD that dft Mot for Sum Jdmt is GRANTED and Pltf Cross Most [sic] for Sum Jdmt is DENIED (ACM) (cc: White, Mandig, ACM)
12/07	51	Jdmt in favor of dfts and against pltf; FUR ORD pltf take nothing by their cmplt and this action is dism. (cc: White, Mandig, ACM)
12/19	52	Dft Ntc of Tax of Costs
12/19	53	Dft Applic for Award of Atty's Fees
12/19	54	Pltf Mot for new trial &/or rehrg & Ntc of Hrg set for 01/23/84 @ 10 am
12/23	55	Pltf's Mot to Amd Complt. (complete mot filed 12/27/83)
12/27	56	Pltf Not of hrg set for 01/23/83 @ 10 am RE: doc #55
12/27	57	Stip re: doc #53

12/28	58	ORD that Pltf shall have through 01/03/84 to file a resp to Dfts Applic for Award of Atty's Fees & Dft shall have through 01/16/84 w/i to file reply memo in support (ACM) (cc: Mandig, White, ACM)
12/29	59	Memo of Clerk's Taxation of Costs in the amt of $2,144.80 (DCC) (cc: Kyle/Mandig, Kessler/White, ACM)
1984		
01/03	60	Dft Resp to Mots for New Trial &/or Rehrg & to Amd Cmplt
01/03	61	Pltf Resp in Oppos to Dft Applic of Atty's Fees
01/05	62	M/E (ACM): For reasons set forth in Dft resp to Pltf Mots for New Trial and to Amd Cmplt, ORD that Pltf Mots are DENIED. (cc: Mandig, White, ACM)
01/05	63	Pltf Aff of Mailing of #61
01/09	64	Pltf Reply in Spprt of Mot for New Trial &/or for Rehrg & in Spprt of Mot to Amd Cmplt
01/16	65	Dfts' Reply Memo in Support of Appl for Atty Fees
01/23	66	ME (ACM) re Mt for Attny Fees; matter taken under advisement
03/09	67	Reporters Transcript of hrg held 01/23/84 bef Judge Marquez
03/19	68	Reporters Transcript of hrg held 11/21/83 bef Judge Marquez

03/21	69	ORD that jdmt entered in favor of dfts and against pltf in the sum of $8,000 as and for attorneys fees; dfts have not furnished the crt with any info on the costs and dfts reply seems to have abandoned this claim; The claim for reimbursement of cost is DENIED. (ACM) (cc; Mandig, White, ACM)
04/02	70	Dft Mot to Amd &/or Clarify Ord of 03/21/84
04/04	71	M/E (ACM): Dft Mot to Increase the Award of Atty's Fees is DENIED. It was not the Crt's intention to set aside the Clerk's Taxation of Costs (cc: White, Kessler, Mandig, ACM)
04/20	72	Dft Ntc of Appeal from Ord dtd 03/21/84 & Ord dtd 04/04/84 (cc: White, Mandig, CA, ACM)
04/20	--	Rec #38851 for appeal filing fees $70.00 from Dfts
04/20	73	Pla Ntc of Appeal form [sic] Ord entrd 12/07/83 & Ord entrd 01/05/84 and Ord entrd on 03/21/84 (cc: Mandig, White, CA, ACM) [Cross-Appeal]
04/20	--	Rec #38853 for appeal filing fees $70.00 from Pla [Cross-Appeal]

....

(3)

Supreme Court, U.S.
FILED
JUL 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2085

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Beaudry Motor Company,

Petitioner,

v.

Abko Properties, Inc., Chrysler Corporation, Chrysler Motors Corporation, and Chrysler Realty Corporation,

Respondents.

Writ of Certiorari to the United States Court of Appeals, Ninth Circuit

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Supplemental Appendix to Petition for Writ of Certiorari

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TABLE OF APPENDICES

Appendix B	Ninth Circuit Court of Appeals Order denying Petitions for Rehearing and rejecting suggestion for rehearing en banc.
Appendix C	United States District Court for the District of Arizona Order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Cross Motion for Summary Judgment, dated December 7, 1983.
Appendix D	United States District Court for the District of Arizona Order awarding Defendant's attorneys' fees, dated March 21, 1984.
Appendix E	United States District Court for the District of Arizona Civil Minutes dated January 5, 1984 denying Plaintiff's Motions for New Trial and to Amend Complaint.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEAUDRY MOTOR COMPANY, an Arizona corporation,	)	CA Nos. 84-1888 84-1889
Plaintiff/Appellant/ Cross-Appellee,	)	CV 82-262 TU ACM
vs.	)	ORDER
ABKO PROPERTIES, INC., a DE corporation (formally known as CHRYSLER REALTY CORPORATION); CHRYSLER CORPORATION, a DE corporation; CHRYSLER MOTORS CORPORATION, a DE corporation; and CHRYSLER REALTY CORPORATION, a DE corporation,	)	
Defendants/Appellees/ Cross-Appellants.	)	

Before: POOLE, NELSON, Circuit Judges, and KELLEHER, District Judge*

The panel has unanimously voted to deny both the petition for rehearing and the amended petition for rehearing. Judges Poole and Nelson have also voted to reject the suggestion for rehearing en banc, and Judge Kelleher has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petitions for rehearing are DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable Robert J. Kelleher, Senior District Judge for the Central District of California, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

BEAUDRY MOTOR COMPANY, an Arizona corporation,	)	
Plaintiff,	)	No. 82-262 TUC ACM
vs.	)	ORDER
ABKO PROPERTIES, INC., et al	)	
Defendants.	)	

This matter is before the court pursuant to defendant's Motion for Summary Judgment and plaintiff's Cross Motion for Summary Judgment, under Rule 56, Fed.R.Civ.P. Defendant's Motion for Summary Judgment is granted and plaintiff's Cross Motion for Summary Judgment is denied.

Beaudry Motor Company (BMC), a Chrysler car dealership, brought this action against ABKO Properties, Inc. (ABKO), Chrysler Corporation, Chrysler Motor Corporation, and Chrysler Realty Corporation (CRC).[1] In four counts of its Second Amended Complaint, BMC alleges the defendants, acting in conspiracy with each other, engaged in acts violative of §§ 1 and 2 of the Sherman Act and the Arizona Uniform State Antitrust Act. BMC's fifth count seeks declaratory judgment.

The suit centers around the 1968 relocation of BMC's dealership. As part of that relocation, BMC purchased property from CRC for the development of a dealership facility, and obtained financing from Southern Arizona Bank for the

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[1] Neither ABKO nor Chrysler Motor Corporation presently exist as separate and identifiable identities.

construction of the facility. In obtaining this financing, Southern Arizona insisted upon additional security from BMC. A lease/sublease and Assignment of Lease and Attorn Agreement provided the additional security required.

Under the lease/sublease, BMC leased the premises to CRC for 25 years, with five options to renew for five years each. The premises were then subleased back to BMC. As per the Assignment and Attorn Agreements, the rental proceeds and BMC's position as lessor were transferred to Southern Arizona Bank.

As BMC has abandoned its antitrust claims,[2] Count 5 is the only claim remaining before this court. Count 5 seeks

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[2] During oral arguments on the motions for summary judgment, BMC advised this court and opposing counsel that it had abandoned its antitrust claims, Counts 1 through 4.

a judgment declaring the lease/sublease arrangement to be void as unconscionable.

BMC's unconscionable cause of action accrued in 1969 at the time the lease/sublease was executed. "The execution of the unconscionable lease is the event giving rise to a claim, not withstanding that it's effect may last the life of the lease." 35 Park Avenue Corporation v. Campagna, 399 N.E.2d 1144, 1145 (NY Ct.App. 1979). BMC's 14 year old lease/sublease is therefore barred by the six years statute of limitation for written contracts, A.R.S. §12-548, and the claim for declaration of unconscionability must be dismissed.

BMC's claim for declaratory judgment as to the interpretation of the lease/sublease fails to present a justiciable issue. BMC alleges the following controversies

1. Whether BMC is granted options to renew and extend sublease for the same term and conditions as are applicable to any renewals which may be granted CRC;

2. What rent is payable under the lease/sublease;

3. Whether BMC is required to pay or reimburse CRC for privilege taxes, if they are assessed;

4. Whether CRC can terminate the sublease if BMC terminates the franchise agreement with Chrysler;

5. Whether use of the property for purposes other than Chrysler dealership constitutes a breach of the lease;

6. Whether the lease/sublease has been extinguished by the doctrine of merger.

The facts show no present controversy between the parties as to the interpretation of the lease/sublease: No

rent has been demanded; no taxes have been assessed; the property is not being used for purposes other than a Chrysler dealership and there is no such threat; time for renewal of the lease/sublease has not arisen; there has been no termination of the franchise agreement, nor has there been threat of such.

"An action for declaratory relief only justifies a declaration of rights upon an existing state of fact, not one which may or may not arise in the future or which might or might not develop. Such cannot form the basis for declaratory judgment." City of Mesa v. Salt River Project Agricultural Improvement and Power District, 92 Ariz. 91, 106, 373 P.2d 722, 733 (1962), appeal dismissed, 83 S.Ct. 1018 (1963). The controversies alleged are based on facts anticipated by BMC. This

court cannot render declaratory judgment on the basis of such hypothetical disputes.

BMC's Cross Motion for Summary Judgment asserts two new legal theories not alleged in its Second Amended Complaint. BMC seeks to have the court declare the lease/sublease a mortgage under A.R.S. §33-702(A) and decree that it is extinguished now that CRC has been discharged by First Interstate Bank.[3] Under its second theory, BMC seeks equitable relief in the form of imposition of a constructive trust.

Neither BMC's original complaint nor Second Amended Complaint sound in statutory mortgage or constructive trust. The complaint would have to be amended yet again before the court could give the relief sought in the Cross Motion for Summary Judgment. "The liberal pleading

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[3] First Interstate Bank is the successor to Southern Arizona Bank.

policy in the Rules prevents dismissal of a meritorious action for purely formal or technical reasons. The district court is not required, however, to speculate over the nature of the plaintiffs' claim or to refuse to enter summary judgment for the defendant simply because the plaintiffs may, theoretically, be entitled to recover under a cause of action based on facts never alleged in the complaint." Murphy v. White Hen Pantry Co., 691 F.2d 350, 353 (7th Cir. 1982).

Rule 56(c) provides that issues of material facts must be evidenced from "the pleadings, depositions, answers to interrogatories . . . admissions on file and affidavits." BMC cannot now create a genuine issue of material fact by alleging new theories not raised in the pleadings. See Agustin v. Quern, 611 F.2d 206 (7th Cir. 1982).

For reasons stated above, defendant's Motion for Summary Judgment is granted, and plaintiff's Cross Motion for Summary Judgment is denied.

Dated this 7th day of December, 1983.

ALFREDO C. MARQUEZ
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

BEAUDRY MOTOR COMPANY, an Arizona corporation,	)	
Plaintiff,	)	
	)	No. 82-262 TUC ACM
vs.	)	ORDER
ABKO PROPERTIES, INC., et al	)	
Defendants.	)	

This matter is before the court on the defendant's application for an award of attorney's fees. The court previously granted summary judgment in favor of the defendants. The action centered around the 1968 relocation of Beaudry's automobile dealership. As part of the relocation, Beaudry entered into a lease/sublease and

assignment of lease and attorn agreement with Chrysler Realty Corporation (CRC). Beaudry's complaint contained four counts alleging that the defendants, acting in conspiracy with each other, engaged in acts violative of sections 1 and 2 of the Sherman Act and the Arizona Uniform State Antitrust Act. Beaudry's fifth count sought declaratory relief on the lease agreement on the ground of unconscionability.

The motion for summary judgment filed by the defendants is based entirely on the depositions of Lee Beaudry, president of the plaintiff corporation and his son, Robert, who is the executive vice-president of the corporation.

The defendants content they are entitled to attorney's fees on two grounds:

(1) The plaintiff's claims were brought and maintained frivolously,

unreasonably, without foundation and/or bad faith.

(2) Plaintiff's entire complaint arose out of contract and defendants are entitled to attorney's fees.

The court finds that the defendants are entitled to some attorney's fees under either theory. Very little investigation would have been required for plaintiffs to determine that the claims set forth in the complaint were barred by the statute of limitations. 15 U.S.C. §15(b), provides that private antitrust actions for damages are "forever barred unless commenced within four years after the cause of action accrues." The agreement which is the subject of the action was executed in July of 1969. The Complaint was filed in 1982. the defendants were able to establish this affirmative defense by deposing two officers of the plaintiff corporation.

Once the motion for summary judgment was filed the plaintiff abandoned the antitrust claims and attempted to change their theory on the fifth count.

The court may award attorney's fees where an antitrust action is clearly barred by the statute of limitations and was unreasonably filed. Ellingson v. Burlington Northern, Inc., 653 F.2d 1327 (9th Cir. 1981). In addition, the court may award attorney's fees to defendants in an antitrust action, despite an absence of bad faith, where there had been prior contractual dealings between the parties and the suit was unreasonable. United States v. Standard Oil Company of California, 603 F.3d 100 (9th Cir. 1979). The court finds that the defendants are entitled to recover attorney's fees under either theory.

The petition for attorney's fees contains time sheets showing 850.3 hours of attorney and paralegal time spent on defending the claims. Defendants are requesting attorneys fees in the sum of $73,594.00 and $4,956.27 in costs.[1] The recapitulation of the time schedules contains the names of four attorneys and one paralegal who worked on the case. The court has reviewed the schedule carefully and it appears that 259.8 hours are directly related to work done on the statute of limitations. It is unfortunate that the clients incurred legal expenses of approximately $150,000 in a case which had no merit to begin with. (The court is assuming that plaintiff's counsel spent the

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[1] The sum of attorney's fees requested by defendants for time on a motion for summary judgment is almost the equivalent of one year salary of a federal district judge.

same amount of time as the defendant's attorneys and probably billed their clients approximately the same amount.) Two hundred and fifty-nine hours is an inordinate amount of time to spend on a motion for summary judgment based on the statute of limitations. There were no disputed facts on the question of the statute of limitations.

Plaintiffs do not contest the billing rate set forth in the petition for attorney's fees. However, the court should exclude those hours that were "excessive, redundant or otherwise unnecessary." Hensley v. Eckerkhart, 103 S.Ct. 1933, 1939-40 (1983). The schedule shows that defense counsel spent 85.6 hours researching the question of the statute of limitations and tying arrangements, 96.8 hours in preparation of the motion for summary judgment and 68.9 hours in

depositions or preparations of the two depositions which were used for the summary judgments. These amounts are excessive. The court feels that the sum of $8,000.00 is more than fair compensation for the time that should have been reasonably spent in getting this matter dismissed on the basis of the statute of limitations. In setting this amount the court has considered the factors set forth by the Ninth Circuit in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975). This factors include:

(1) The time and labor that should have been reasonably expended;

(2) Whether new and difficult questions were presented;

(3) The skill required to properly perform the task;

(4) The preclusion of other employment caused by the litigation;

(5) The customary fee charged;

(6) Whether the fee was contingent or fixed;

(7) The limitations imposed by the client or the case;

(8) The amount involved and the results achieved;

(9) The experience, reputation and ability of counsel;

(10) The undesirability of the case;

(11) The professional relationship with the client; and

(12) Awards given in similar cases.

The court could not consider all of these factors because there was no evidence presented to the court upon all of the factors. The most important ones which the court has considered are 1, 2, 3, 5, 8, 9, 10 and 12.

IT IS ORDERED that judgment be entered in favor of the defendants and against the plaintiff in the sum of $8,000

as and for attorney's fees. Defendants have not furnished the court with any information on the costs and defendants' reply seems to have abandoned this claim. The claim for reimbursement of cost is denied.

Dated this 21st day of March, 1984.

ALFREDO C. MARQUEZ
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(CIVIL MINUTES-GENERAL)

Civil Case No. CIV-82-262-TUC-ACM

Date: January 5, 1984

Title: Beaudry Motor Co. v. Abko Properties, Inc.

HON. ALFREDO C. MARQUEZ JUDGE

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For reasons set forth in defendant's response to plaintiff's motions for new trial and to amend complaint,

IT IS ORDERED that plaintiff's motions are denied.